Supreme Court, U.S.
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No. 95-847

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS GAMBINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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No. 95-847

IN THE
Supreme Court of the United States
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THOMAS GAMBINO,

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-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

Both by what it says and by the crucial argument that it fails to address, the Brief for the United States in Opposition ("Opp. Br.") demonstrates the substantial national importance of this case to the administration of justice in the Federal courts. Review of this case is essential to ensure fair and consistent application of the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.* (the "Act"), throughout the country and to resolve an acknowledged circuit split.

Perhaps no other statute has a greater impact on the day-to-day administration of justice than the Speedy Trial

Act. Not only does it permeate every aspect of the criminal process, but its demands inevitably affect the judicial resources available for civil cases as well. This case presents an unusual opportunity to consider a host of issues that frequently arise in the practical administration of the Act; to resolve a circuit split on one of those issues; and to reaffirm the "cardinal canon" -- which is ignored in both the Government's opposition and the decision below -- "that a legislature . . . means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

While the Government strives mightily to justify the "harmless error" holding below, it offers no response whatever to petitioner's lead argument -- that Congress has *mandated* that an indictment *must* be dismissed when the Speedy Trial Act is violated (Petition for Certiorari ("Pet.") at 14-18). The decision below flies in the face of this Court's unequivocal view in *United States v. Taylor*, 487 U.S. 326, 332 (1988): "the statute *admits no ambiguity* in its requirement that when . . . a violation has been demonstrated, 'the . . . *indictment shall be dismissed* . . . .'" That being so, it is incontrovertible that the failure of the court below to dismiss petitioner's indictment upon finding that the Act was violated "*does* . . . affect substantial rights" of petitioner, Rule 52(a), Fed. R. Crim. P. (emphasis added), and thus cannot be harmless error.

I. THIS APPEAL RAISES SEVERAL ISSUES OF NATIONAL IMPORTANCE UNDER THE SPEEDY TRIAL ACT, INCLUDING A CIRCUIT CONFLICT THAT IS RIPE FOR RESOLUTION.

The Government's primary argument for denying certiorari in this case is that the court of appeals erred in finding a Speedy Trial Act violation. The very arguments that the Government raises, however, show the existence of a circuit conflict and the importance of the issues presented to the administration of justice.

First, the Government admits that a clear circuit conflict is raised by this case. On one side are the decision below and the decision that it followed, *United States v. Clymer*, 25 F.3d 824, 830 (9th Cir. 1994); and on the other are decisions of the Fourth, Fifth, Tenth and Eleventh Circuits.[1] With half of the circuits now having opined, they have firmly divided into two irremediably disagreeing camps on the issue whether this Court's decision in *Henderson v. United States*, 476 U.S. 321, 330 (1986), requires exclusion from the speedy trial calculation of all time -- in many cases, as here, years -- between the filing and determination of a motion whose decision is postponed until at or after trial.

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[1]*See United States v. Gutierrez*, 48 F.3d 1134, 1136 (10th Cir.), *cert. denied*, 115 S. Ct. 2598 (1995); *United States v. Young*, 45 F.3d 1405, 1411 & n.6 (10th Cir.), *cert. denied*, 115 S. Ct. 2633 (1995); *United States v. Beard*, 41 F.3d 1486, 1489 (11th Cir. 1995); *United States v. Bermea*, 30 F.3d 1539, 1568 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1113 (1995); *United States v. Riley*, 991 F.2d 120, 124 (4th Cir.), *cert. denied*, 114 S. Ct. 392 (1993).

Although the Government concedes the circuit conflict, it objects to review "at the prevailing party's insistence" (Opp. Br. at 10). Reliance upon this general precept, however, is misplaced here for several reasons. First, the Government itself has underlined the issue's importance by making it the first point in its brief. Second, the Government does not dispute that the conflict is ripe for review. Third, the Government's position on this issue, like its position on the harmless error issue, undermines the express language and intent of the Speedy Trial Act, and threatens to consign the Act to oblivion.

Indeed, beyond an out-of-context quote from *Henderson* (Opp. Br. at 9), the Government offers no response to the careful reasoning of the court below and the Ninth Circuit on this issue. In refusing to toll the Act's time limits, both courts applied the express statutory language (which excludes only "the delay *resulting from* any pretrial motion", 18 U.S.C. §3161(h)(1)(F) (emphasis added)), in deciding that a motion which "does not effect a trial court's ability to proceed" to trial (App. 11a), does not "'*result[] from* the pendency of the motion'", *id.*, quoting *Clymer*, 25 F.3d at 830 (emphasis added). Such delay is therefore not excludable.

Second, the Government argues that the court of appeals erred in rejecting application of the "complexity" exception in section 3161(h)(8)(A) (Opp. Br. at 10-11), and claims that "petitioner's own conduct contributed to the delay" (Opp. Br. at 11-12). While the court of appeals carefully considered and rejected the Government's position on both issues (App. 6a-9a and 11a-16a), the questions that the Government raises involve matters of great practical importance in the day-to-day application of the Act by the lower courts.

On both of these issues (as well as on the *Henderson* issue discussed above), this case presents a perfect factual record. It gives this Court the opportunity to provide valuable guidance on application of the "complexity" exception and waiver doctrine under the Act, as well as to resolve the circuit split on application of *Henderson* to indefinitely delayed decisions on pretrial motions.

II. THE "HARMLESS ERROR" DOCTRINE SHOULD NOT BE APPLIED TO EXCUSE GOVERNMENT VIOLATION OF THE SPEEDY TRIAL ACT.

In an effort to preserve the circuit court's unprecedented application of the "harmless error" doctrine to excuse violation of the Speedy Trial Act, the Government cites two statutory sources of the doctrine (Opp. Br. at 12-13). Conspicuously absent from the Government's argument, however, is any mention whatever of the mandatory language of the Speedy Trial Act that flatly compels dismissal of an indictment if -- as here -- "a defendant is not brought to trial within the time limit required" by the Act. 18 U.S.C. §3162(a)(2). As this Court has expressly recognized, "the statute admits no ambiguity" in this regard. *Taylor*, 487 U.S. at 332. The harmless error holding below simply cannot be squared with the language or logic of either *Taylor* or the Speedy Trial Act. Indeed, since this statutory language argument, based on the phrase "*shall* be dismissed", was Petitioner's lead argument (Pet. at 14-18; *see also* Pet. at 21-22), the Government's complete failure to respond directly to it must be taken as a concession of the point.

Both of the harmless error statutes cited by the Government, 28 U.S.C. § 2111 and Rule 52(a), Fed. R. Crim. P. -- neither of which was relied upon by the court

below -- expressly apply only when the "error" or "defect" "does not affect substantial rights". Yet a right could hardly be more "substantial" than the right of a criminal defendant to have an indictment against him dismissed. For this reason, the Government is wrong in arguing that "petitioner would have been in no better position had the superseding indictment been dismissed without prejudice" (Opp. Br. at 15). This Court's decision in *Taylor* explicitly recognized the value to a defendant of dismissal without prejudice. *Taylor*, 487 U.S. at 342.

Among other things, petitioner would have been "immunize[d] from prosecution" (Opp. Br. at 14) on this indictment.[2] Petitioner would have been free -- as Congress intended -- of the stigma of a pending prosecution for some period of time. *See United States v. Marion*, 404 U.S. 307, 320 (1971); *United States v. Rojas-Contreras*, 474 U.S. 231, 238 (1985) (Blackmun, J., concurring). Indeed, unless the Government is asserting the cynical view that it totally controls the grand jury's actions, there is some possibility that reindictment would not have occurred at all. *See Taylor*, 487 U.S. at 342.[3]

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[2]The fact that Congress has expressly directed that a Speedy Trial Act violation must be remedied by dismissal of an indictment distinguishes this case from decisions such as *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) and *United States v. Mechanik*, 475 U.S. 66 (1986), holding that harmless error analysis applies to certain errors in the grand jury process. *See* Opp. Br. at 13-14.

[3]In this case, the delay that would have resulted from the need to reindict petitioner could also have affected the trial

(continued...)

Nor does the Government dispute petitioner's contention that engrafting a "harmless error" exception onto the Speedy Trial Act's dismissal remedy will render the Act a practical nullity. *See* Pet. at 16-18. As this Court recognized in *Taylor*, the remedy of dismissal without prejudice was a last-minute compromise that was the key to obtaining passage of the Act. *Taylor*, 487 U.S. at 334-35 & n.8. If dismissal without prejudice becomes a "toothless sanction" (*id.* at 342) -- as it surely would if the likelihood of reindictment justifies an affirmance on "harmless error" grounds -- it would effectively rewrite a statute that was supported by its sponsors only because it contained meaningful sanctions against delay. *Id.* at 334.[4]

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[3](...continued)
itself. *Cf. United States v. Taylor*, 487 U.S. 326, 342 (1988) (dismissal without prejudice "is not a toothless sanction" because, *inter alia*, of "effect of delay on the Government's ability to meet" "the burdens borne by the prosecution"). The court of appeals held that certain exculpatory material that petitioner first learned of shortly after his trial was "quintessential *Brady* material" (App. 26a). This included a tape recording of a key Government witness telling a potential grand jury witness: "Ten percent of the time, you out and out lie." Although the court of appeals found that suppression of the *Brady* material would not have warranted a new trial (App. 27a), the availability of this evidence at trial on a new indictment would surely have led to a different presentation by the defense.

[4]*See, e.g.*, A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 31-32 (Federal Judicial Center 1980) (cited in *Taylor*, 487 U.S. at 334): "Proponents
(continued...)

In the face of the plain language of the Speedy Trial Act ("shall be dismissed", 18 U.S.C. §3162(a)(2)) and this Court's specific pronouncement that such language "admits no ambiguity in its requirement" of dismissal, *Taylor*, 487 U.S. at 332, the Government's strained effort to justify harmless error review must be rejected. The Government's position does not harmonize the Speedy Trial Act and the harmless error statutes. Rather, it renders the Speedy Trial Act virtually meaningless in the real world.

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[4](...continued)
of the legislation regarded the threat of dismissal as the critical element that made the time limits more than merely precatory"; *Id.* at 219, quoting 120 Cong. Rec. 41794-95 (1974) (remarks of Mr. Cohen):

> "Notwithstanding the position [favoring mandatory dismissal] of the American Bar Association, the judges I have mentioned, and even Justice [then Assistant Attorney General] Rehnquist's statement on this matter, in the interest of seeing that this measure be passed, approved, and signed into law, I offer an amendment which would allow the court in its discretion to dismiss a case with or without prejudice."

CONCLUSION

For the foregoing reasons, and for those stated in the Petition, this Court should grant certiorari and review the decision below.

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